CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 167.

THE MIDDLETOWN NATIONAL BANK

vs.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 5, 1904.

(19,188.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1904.

1 United States Circuit Court of Appeals for the Second Circuit.

THE MIDDLETOWN NATIONAL BANK, Complainant-Appellant,
v.
TOLEDO, ANN ARBOR & NORTH MICHIGAN RAILWAY COMPANY *et al.*, Defendants-Appellees.

This cause comes here on an appeal from a decree of the United States circuit court for the southern district of New York sustaining demurrers to the bill of complaint and dismissing the bill. The complainant, a creditor of the railway company defendant, a corporation of the State of Ohio, having recovered a judgment in the supreme court of the State of New York, upon which execution was issued and returned unsatisfied, brought its bill in equity, for the benefit of itself and other creditors, against numerous stockholders of the railway company defendant resident in the district, to enforce the liability of such stockholders for debts of such company under the laws of Ohio; making such company also a party defendant. Defendants demurred and the circuit court sustained the demurrer.

2 The constitution of Ohio (1851), art. XIII, section 3, provides as follows:—

"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

In pursuance of this provision of the constitution the legislature adopted statutory provisions with respect to the stockholders of certain corporations, which appear in the Revised Statutes of 1880, section 3258, in the following form:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

Section 3260 of the Revised Statutes of 1880, as amended in 1894, provided as follows:—

"A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such actions there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on

said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action, the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence if known, and that it is impracti-
cable to secure service of summons upon such stockholders
3 or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non-resident of the State, and judgment shall be rendered against the stockholders who have been served with summons for the *pro rata* amount for which they would be liable if all solvent stockholders resident of the State were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section 3258."

As so amended this section stood at the time when this suit was begun. Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section as further amended and supplemented, provided as follows:

"SECTION 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

SECTION 3260 (*a*). The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

SECTION 3260 (*b*). If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce the same by its
judgment, as in other cases.

4 SECTION 3260 (*c*). In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockholders, as provided in sections 5048, 5049, 5050, 5051, or 5052 of the Revised Statutes and

shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

SECTION 3260 (*d*). If the debts of the company remain unsatisfied the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

SECTION 3260 (*e*). Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published in such manner as it shall direct, requiring all creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

SECTION 3260 (*f*). Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors.

SECTION II. That said section 3260 be, and hereby is, repealed.

SECTION III. This act shall apply to pending actions and shall take effect and be in force from and after its passage.

The court below sustained the demurrer on the following ground:

"It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by sec. 3260, R. S. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other causes cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant and the demurrer is sustained If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for."

Questions Certified.

This court has been unable to reach a conclusion whether upon the foregoing facts the bill should have been dismissed. The questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision, are:

First. Whether article XIII, section 3 of the constitution of Ohio is so far self executing that it may be enforced outside of the
6 jurisdiction of said State without compliance of said requirements of section 3260 of the Revised Statutes of said State as amended in 1894.

Second. Whether article XIII, section 3 of the constitution of Ohio is so far self executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of section 3260 of the Revised Statutes of said State as amended in 1900.

W. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

7 UNITED STATES OF AMERICA,
Southern District of New York.

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify, that the foregoing certificate was filed and entered of record in my office on the 21st day of December, 1903, and as directed by the judges of said court, said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Dated, New York, December 22, 1903.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

8 [Endorsed:] United States circuit court of appeals, second circuit. The Middletown Nat'l Bank, compl't-appellant, *vs.* Toledo, Ann Arbor & North Michigan Railway Co., *et al.*, def'ts-appellees. Certificate. United States circuit court of appeals, second circuit. Filed Dec. 21 1903. William Parkin, clerk.

Endorsed on cover: File No. 19,188. U. S. C. C. of appeals, 2nd circuit. Term No. 167. The Middletown National Bank *vs.* Toledo, Ann Arbor & North Michigan Railway Company *et al.* Filed January 5", 1904. File No. 19,188.